BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF EUGENE C. JENSEN, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, UNITED STATES WATER AND POWER RESOURCES SERVICE, and QUINCY-COLUMBIA IRRIGATION DISTRICT, Respondents, EAST COLUMBIA IRRIGATION DISTRICT, and SOUTH COLUMBIA IRRIGATION DISTRICT, Intervenors.	PCHB No. 80-96 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal from the denial of groundwater application No. G3-22708, having come on regularly for formal hearing on the 20th and 21st days of October, 1980, in Lacey, Washington, and appellant appearing through his attorney Ralph J. Rodamaker; respondent Department of Ecology appearing by its assistant attorney general

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Wick Dufford; respondent-intervenor United States Water and Power Resources Service appearing by its attorney William Dunlop; respondent-intervenors Quincy-Columbia, South Columbia, and East Columbia Basin Irrigation Districts appearing by their attorney Richard A. Lemargie, with David Akana, presiding, and the Board having considered the exhibits, records and files herein, and having mailed its Proposed Order to the parties on the 20th day of March, 1981, and more than twenty days having elapsed from said service; and

The Board having received exceptions to said Proposed Order from appellant and replies thereto, and the Board having considered the exceptions and denying same, and being fully advised in the premises, NOW THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said Proposed Order containing Findings of Fact, Conclusions of Law and Order dated the 20th day of March, 1981, and incorporated by reference herein and attached hereto as Exhibit A, are adopted and hereby entered as the Board's Final Findings of Fact, Conclusions of Law and Order herein.

DATED this 8th day of June, 1981.

POLLUTION CONTROL HEARINGS BOARD

David Akana
DAVID AKANA, Member

Gayle Rothrock
GAYLE ROTHROCK, Member

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IN THE MATTER OF EUGENE C. JENSEN, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, UNITED STATES WATER AND POWER RESOURCES SERVICE, and QUINCY-COLUMBIA IRRIGATION DISTRICT, Respondents. EAST COLUMBIA IRRIGATION DISTRICT, and SOUTH COLUMBIA IRRIGATION DISTRICT, Intervenors.	PCHB No. 80-96 PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal from the denial of groundwater application No. G3-22708, came before the Pollution Control Hearings Board, David Akana, presiding, at a formal hearing in Lacey on October 20 and 21, 1980. The parties filed written closing statements.

EXHIBIT A

Appellant appeared and was represented by his attorney, Ralph J. Rodamaker; respondent Department of Ecology was represented by Wick Dufford, assistant attorney general. Respondent-intervenor United States Water and Power Resources Service was represented by its attorney, William Dunlop; respondent-intervenors Quincy-Columbia, South Columbia, and East Columbia Basin Irrigation Districts were represented by their attorney, Richard A. Lemargie.

Having heard or read the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes these

FINDINGS OF FACT

I

The Grand Coulee Dam and the Columbia Basin Project were constructed by the federal government to provide for, among other purposes, the withdrawal of substantial quantities of water of the Columbia River and using it for agricultural irrigation purposes on more than one million acres of arid lands in east-central Washington. The total amount of waters requested for diversion was 25,000 cubic feet per second. Such waters were first placed on the lands in the northern portions of the project in 1952. One result of such irrigation was that a certain amount of the waters entered the underlying rock and seeped downward until meeting and commingling with the naturally occurring groundwaters causing the groundwater table to rise.

By 1967 it became apparent to the Department of Ecology's (DOE)

predecessor agency that more information about the groundwaters of the Quincy Basin was needed for the proper management of the resource. A five year study of the total groundwater situation was undertaken. The study revealed that two geologic zones are present in the Quincy Basin: 1) an "unconsolidated" zone occupying a depth from land surface to the basalt zone, and 2) a basalt zone. Before application of irrigation water from the Columbia Basin Project, about 105,000 acre feet of natural groundwater was discharged annually, about 70,000 acre feet in the unconsolidated zone and the remainder in the upper part of the basalt zone. About 44,000 acre feet of the total amount could be withdrawn each year without "mining" the groundwater. Between 1952 and 1968, about 2.73 million acre feet of water were added as inactive storage to the zones resulting from percolation from irrigation of project lands. That number increased to 2.88 million cubic feet when projected to 1973.

II

The operating concept for water distribution in the Columbia Basin Project includes the application of water in the northern and northwestern areas of the project and recapture by project facilities to prevent its natural dissipation, primarily at the Potholes Reservoir. From that point the water would be distributed to southerly portions of the project.

III

The groundwater table in the Quincy subarea (WAC 173-134-020(9)) has risen with the commencement of irrigation in 1952. The increase

is the result of importation of Columbia River waters by the United States Water and Power Resources Service (WPRS) through its project activities.

IV

Appellant Eugene C. Jensen owns about 165 acres of land situated within Section 15, T. 20 N., R 25 E.W.M., in Grant County Washington. The property lies within the Quincy groundwater subarea as described in WAC 173-124. It is the only land owned by appellant for farming purposes.

Appellant's land is located within the Quincy subarea and shares groundwater commonly existing in the subarea. The groundwater is composed of both naturally occurring (public) groundwater and imported (artificial) water which have been commingled in the unconsolidated and upper basalt zones. There is no way to distinguish between public and artificial groundwater except by their respective volumes over the subarea. There is no "conclusive" evidence as to the "exact depth" of commingling of artificially stored groundwater and public groundwater. On the basis of the best information available, DOE tentatively concluded that such commingling was limited to the top 200 feet of the basalt. This conclusion was not discredited by any persuasive evidence.

V

Before appellant purchased the property he was told by an employee of the predecessor agency of the WPRS that the subject property was not suitable for irrigation. Appellant thought he could grow alfalfa

and grain crops on the land and that groundwater was present on the property. He purchased the property in 1968.

VI

In 1969 appellant believes that he applied for a "water permit" but is not sure of the agency to which the application was made. The application was made in response to advertisements that water must be claimed before a certain date. Appellant believes that he filed a document with a state agency located in Olympia, and received a water right application form in 1969. Upon his return with the application in 1970, appellant believes he was told that the application should be filed in Spokane. Appellant has lost all documentary evidence relating to a "water permit" or an application therefor prior to 1974. Respondent DOE has no record of such application nor does it have a claim of water right filed pursuant to Chapter 90.14 RCW. The evidence is persuasive that an application for public groundwater was not filed with DOE under RCW 90.44, and that neither DOE or its predecessor agency caused appellant to be misled.

VII

On February 28, 1974, appellant filed an application to appropriate public groundwater, No. G3-22708. He requested 1800 gallons per minute (GPM) from a 16" diameter, 160 foot deep well for the purposes of irrigating 160 acres of land.

At the time the application was received, DOE had tentatively determined that all available public groundwater had been fully appropriated. The application was held for priority purposes only.

Appellant, and others similarly situated, were notified of such.

VIII

On February 10, 1975, appellant filed an application with DOE to use artificially stored groundwater (chapters 173-134 and 136 WAC). A priority date of February 28, 1974, the date of his filing his application to appropriate public groundwater (G3-22708), was noted thereon. Appellant noted on his application that he did not recognize the United States as the owner of the water under his land and that he made his application without prejudice to whatever other rights he may have. In due course, appellant was issued on March 17, 1975, and he accepted, a permit to use WSPR's artifically stored groundwater with priority number QB-287 which permit did not acknowledge appellant's claim.

IX

The artifically stored groundwater permit allowed the withdrawal and use on appellant's land of 1800 gallons per minute (GPM) and 560 acre feet per year of water from March 1 to October 31 each year from a well to be drilled not deeper than 200 feet into the basalt. On November 28, 1977, appellant entered into an agreement with the WSPR as required by the permit.

X

In 1974 (without a permit) or 1976 (with a permit), appellant commenced drilling a well on his property. By mid-1977, and after delays, appellant reached a depth of 147 feet. A pump was installed and operated, but at only 80 GPM, the yield was not adequate for his

irrigation purposes. No water well report was filed by the well driller.

Appellant concluded that there was no water where the WPRS had indicated it would be. He decided to drill deeper until reaching a depth of 225 feet where adequate water for his irrigation was found in July, 1978. A well report was filed for the deeper hole indicating a static water level of 30 feet below land surface.

XI

Appellant's well is not deeper than 200 feet into the basalt formation and falls within the shallow management unit (SMU) as defined in ch. 173-134 WAC. The well is situated deeper than the pre- and post-project water table level. Water withdrawn at the depth of appellant's well before the project affected the water table would have been public groundwater. However, the amount of public groundwater quantified by DOE was fully appropriated in the SMU before appellant made application for a public groundwater permit. Project water which had entered the SMU mixed with the naturally occurring water and thereby raised the water table substantially. Therefore, water now withdrawn by appellant must be that caused by the project for which a declaration for artificially stored groundwater has been made by WSPR and accepted by DOE. The depth at which appellant is withdrawing water from the SMU is immaterial. The accepted declaration's reference to an increase in the altitude of the water table as a result of the project relates to an observed physical occurence. The resulting increase in the volume of water can thereby

be ascertained, but water being fungible in nature, the location of each project water molecule cannot be specifically ascertained except in gross.

XII

In viewing all the evidence, the aquifer appellant withdraws groundwater from is not separate and apart from the SMU and WSPR's accepted declaration. The evidence does establish that appellant's well draws groundwater, both geologically and hydrologically, from the SMU of the Quincy Basin subarea.

XIII

By agreement of DOE and appellant, appellant's public groundwater application was processed. As a result of public notice, the WPRS and the Quincy-Columbia Basin Irrigation Districts objected to the granting of a permit. DOE denied the application, which decision was appealed to this Board.

XIV

Chapter 173-134 WAC was filed on January 9, 1975. Therein, WAC 173-134-110 required DOE to mail a copy of chapters 173-134 and 173-136 WAC to persons described in WAC 173-134-060(2)(e)(i)(I). Appellant is such a person described, and a copy of each rule should have been, but was not, mailed to him. No prejudice to appellant was shown from the omission in the instant matter, the review of DOE's decision on a public groundwater application.

XV

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the persons and subject matter of this proceeding. This matter involves DOE's denial of an application to appropriate public groundwater pursuant to ch. 90.44 RCW. Certain provisions of ch. 90.03 RCW are relevant in the review of DOE's decision. RCW 90.44.020; RCW 90.44.060.

II

RCW 90.03.290, made applicable to this matter by RCW 90.44.060, requires DOE to make four determinations prior to the issuance of a permit to appropriate public groundwater: (1) what water, if any, is available; (2) to what beneficial uses the water is to be applied; (3) will the appropriation impair existing rights; and (4) will the appropriation detrimentally affect the public welfare. Stempel v. Department of Water Resources, 82 Wn.2d 109 (1973). In addition, RCW 90.44.070 requires that the withdrawal of public groundwaters not exceed the capacity of the underground bed or formation to yield such water within a reasonable or feasible pumping lift.

III

The evidence shows that 44,000 acre-feet of water, plus a 24 percent return flow, enters the SMU of the Quincy groundwater subarea as public groundwater which is available for withdrawal. The DOE has, through the issuance of permits and certificates authorized the withdrawal of 57,516 acre-feet of public groundwater each year from

the SMU. DOE's determination that no public groundwater is available from appellant's well is adequately supported by credible evidence. Appellant claimed, but did not establish, that public groundwater was available because some amount of it was not now actually being put to a beneficial use.

IV

The use of water for irrigation purposes is a beneficial use. RCW 43.27A.020 and RCW 90.54.020(1).

V

Evidence establishes that no public groundwater is available for allocation and that the groundwater in appellant's well is artificially stored groundwater owned by WSPR as set forth in its accepted declaration. The total amount of water available for irrigation in the Quincy ground water subarea has been fully allocated through permits, certificates, and WSPR's declaration. Relatively small amounts of public groundwater are apparently still available, but such amounts are reserved for domestic uses. WAC 173-134-060(1). The granting of appellant's application would impair the exercise of rights to full extent as set forth in the permits, certificates, and declaration.[1] Therefore the proposed appropriation would impair existing rights.

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1. We need not address the situation where actual water use is less than authorized water use. The evidence in this case does not show a material difference between the two uses.

VI

Appellant's request to appropriate public groundwater would be detrimental to the public welfare. In particular, appellant's attempt to leap over 186 more senior applicants would be inimical to the statutory priority scheme. RCW 90.03.010; RCW 90.03.340. If allowed, the orderly management of the state's waters would be threatened. Moreover, the uncertainty resulting from a system where the volume of water allocated exceeds the limited amount of water available could lead to wasteful expenditures of capital for those scrambling permittees who developed wells but who could not ultimately withdraw water.

VII

DOE apparently did not make a determination under RCW 90.44.070. In view of our holding affirming DOE under the criteria in RCW 90.03.290, there is no practical reason to remand the matter for further consideration.

VIII

DOE is the agency responsible for management of the state's surface and groundwaters. RCW 43.21A.060. The provisions of ch. 90.03 RCW are extended for the management of all "groundwaters", including "natural groundwater" and "artificial groundwater." RCW 90.44.020. Public groundwaters include all natural groundwater and abandoned or forfeited artificially stored groundwater. RCW 90.44.040. Permits are required to appropriate public groundwater. RCW 90.44.050. Artificially stored groundwaters are secured by delcaration. RCW 90.44.130.

IX

Appellant's appeal insofar as it attempts to litigate the ruling on the declarations of claim of artificially stored groundwater (DOE docket No. 74-772, dated January 8, 1975), is not timely. RCW 43.21B.120 and .230.

Appellant's nonrecognition of WSPR's rights accepted in the declaration cannot divest WSPR's water rights therein described.[2] See RCW 90.44.130. Such rights are "existing rights" within the meaning of RCW 90.03.290. These rights have not been shown to have been abandoned or forfeited to any degree.

X

Common sense and the statutes support the concept of commingled waters. RCW 90.03.030 allows any person to convey any water along any natural stream or lake. By analogy, WSPR's volume of water is simply being conveyed to another location and is not lost because the "stream" or "lake" is located underground. See Miller v. Wheeler, 54 Wash. 429 (1909). See Water Right Laws in the Nineteen Western States, Vol. 1, page 606; vol. 3, page 558. It follows that WSPR's water has not been abandoned or forfeited because of commingling.

XI

Appellant's public groundwater application, with a priority date of February 28, 1974, is evaluated by the applicable criteria in

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2. Even if WSPR's rights were quantified by settlement, as appellant characterizes it, they are "rights" nonetheless until abandoned or forfeited. Moreover, if WSPR's "rights" can now be litigated anew before this Board, then appellant's "rights", such as they are, can never vest. See Conclusions of Law XI and XII.

ch. 90.03 RCW and ch. 90.44 RCW. Chapter 173-134 WAC does not purport to change the statutory criteria. WAC 173-134-060(1). The regulation does set forth background information and procedures to withdraw groundwater. However, DOE presented convincing testimony and documentary evidence relating to the applicable substantive statutory criteria. This evidence was independent of factual matters set forth in the regulation. The mere use of procedures set forth in ch. 173-134 WAC were not shown to be erroneous or prejudicial to appellant, even assuming that appellant had a "vested right" to some particular set of criteria at the time DOE denied his application. Even if appellant's view is correct with respect to the applicability of the regulations, WSPR's "rights" long preceded the filing of any of his applications and appears to be superior to appellant's "rights."[3]

XII

Appellant's "right" to public groundwater never rose above an application for it of a certain priority date. This gives appellant an opportunity to appropriate whatever public groundwater that may become available according to his priority date. This "right" was not deemed waived by DOE. The waiver referred to in the recommended decision and WAC 173-134-060(2)(i) excludes public groundwaters.

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3. Appellant's appeal of chapters 173-134 and 173-136 WAC relating to DOE rulemaking are not orders or decisions appealable to this Board. RCW 34.04.070 provides procedures for appealing rulemaking decisions. City of Seattle v. DOE, PCHB No. 79-165.

XIII

Appellant's request that the Board allow him to withdraw groundwater without a permit until further research is performed by DOE is not authorized by statute, especially in light of the fact that studies show no public groundwaters available. Peterson v. Department of Ecology, 92 Wn.2d 306 (1979), cited by appellant, does not authorize the Board to issue a permission to withdraw water, or a quasi-permit, notwithstanding the statute. The circumstances of Peterson involved a cease and desist order rather than a permit denial, as here, where discretion has been exercised. In any case, appellant has not presented such facts and circumstances that would move this Board to flex its "equity powers", such as they may be, to allow the unlawful withdrawal of public groundwater without a permit.

XIV

Although the burden of proof is on appellant in this case, respondents have presented clear and persuasive evidence supporting their version of the facts. Weighing all the evidence, if respondents carry the burden of proof, they have amply met that burden.

XV

Appellant's other arguments are without merit.

XVI

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The Department of Ecology decision denying application G3-22708 for public groundwater is affirmed.

DATED this 20th day of March, 1981.

POLLUTION CONTROL HEARINGS BOARD

David Akana

DAVID AKANA, Member